

ABORIGINAL RIGHTS AND *DELGAMUUKW* V. *THE QUEEN*

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On the long and tortuous path to justice for the First Nations of Canada, the case of *Delgamuukw v. The Queen*¹ is likely to become one of the most important landmarks. Whether the outcome of this ongoing litigation will represent a step towards, or a sidetrack from, the achievement of a just settlement for Aboriginal Peoples is now in the hands of the Supreme Court. The case raises a number of issues of immense consequence that were not addressed in the Supreme Court's decision in *Sparrow* (1990)² or that have been left unresolved by the failure of attempts to amend the constitution to explicitly recognize an inherent Aboriginal right of self-government. Is Aboriginal title an "existing aboriginal right" protected by section 35 of the *Constitution Act, 1982* in those parts of the country where Aboriginal lands have not been ceded by treaty? Does the concept of Aboriginal rights entail a right of self-government, and if so, was that right extinguished prior to 1982?

THE TRIAL JUDGMENT

The *Delgamuukw* case involves a claim brought by the hereditary chiefs of the Gitksan and Wet'suwet'en peoples to ownership of and jurisdiction over 58,000 square kilometres of territory in central British Columbia. The trial of this momentous claim lasted 374 days from May 1987 to June 1990. The trial judgment of McEachern C.J., released in March 1991, dismissed the claims to ownership and jurisdiction. McEachern C.J. held that Aboriginal jurisdiction or self-government was extinguished by the exercise of British sovereignty over the mainland colony of British Columbia in 1858. He further held that Aboriginal title over unceded territory throughout B.C. had been extinguished by colonial enactments passed prior to 1871 which asserted Crown title over all lands in B.C.. McEachern C.J. did issue a relatively inconsequential order that, subject to the general law of the province, the B.C. government has a continuing fiduciary duty to permit the plaintiffs to use unoccupied or vacant Crown land in the territory for Aboriginal sustenance purposes.

The breadth of McEachern C.J.'s reasoning meant that the Aboriginal title and Aboriginal rights of self-government of B.C. First Nations were lost entirely over a century ago and thus no longer qualify as "existing" rights protected by section 35 of the *Constitution Act, 1982*. Given that these rights were extinguished, in McEachern C.J.'s view, by the simple exercise of British legislative sovereignty and by the assertion of underlying Crown title in land, the implications of his reasoning were dire for Aboriginal Peoples throughout the country.³

THE B.C.C.A. JUDGMENT

The appeal to the British Columbia Court of Appeal was argued in 34 days of hearings from May to July 1992. The newly elected N.D.P. government abandoned the argument — made by the previous Social Credit administration and accepted by the trial judge — that there had been a "blanket extinguishment" of Aboriginal title in the colony prior to 1871. In its decision released in June 1993, the Court of Appeal ruled unanimously in favour of the plaintiff in light of the government's new position. The Court thus allowed the appeal in part and issued a declaration that the plaintiffs' have existing Aboriginal rights of occupation and use over much of the claimed territory. The determination of the precise boundaries of the lands subject to the plaintiffs' Aboriginal title was left to negotiations.

In all other significant respects, the factual findings and legal rulings of the trial judge were affirmed by a 3-2 majority of the Court. The majority judgments of Macfarlane J.A. (Taggart J.A. concurring) and Wallace J.A. found that the trial judge had made no palpable or overriding errors in his assessment of the evidence. They agreed with his conclusion that any Aboriginal right held by the plaintiffs to exercise jurisdiction over the territory or their people had been extinguished by 1870. In separate dissents, Lambert J.A. and

Hutcheon J.A. disagreed on this crucial point. In their view, the plaintiffs' Aboriginal rights included a right of self-government or self-regulation that had not been extinguished by the assertion of either British or Canadian sovereignty.

ABORIGINAL TITLE AND SELF-GOVERNMENT AS COMMON LAW ABORIGINAL RIGHTS

The Supreme Court in *Sparrow* defined Aboriginal rights as including customs or practices that constitute "an integral part" of a "distinctive" Aboriginal culture.⁴ This test was applied by the judges of the B.C.C.A. in *Delgamuukw*.⁵ While Aboriginal title is a well-established component of the common law doctrine of Aboriginal rights,⁶ the Supreme Court has yet to rule on the question of whether the doctrine of Aboriginal rights entails a right of self-government. The majority judges in *Delgamuukw* seemed to presume that it does, although they did not find it necessary to directly address the point given their conclusions on extinguishment, to be discussed below. The dissenting judges did address the point. Lambert J.A. found that "the aboriginal rights of self-government and self-regulation," to the extent that they "formed an integral part" of a "distinctive culture," are recognized as part of the common law doctrine of Aboriginal rights.⁷ Hutcheon J.A. reached a similar conclusion regarding a more narrowly conceived "aboriginal right of self-regulation."⁸ Indeed, once one accepts, as Macfarlane J.A. did, that the Gitksan and Wet'suwet'en peoples had an "organized society" at the time that British sovereignty was asserted,⁹ the conclusion seems inescapable that a right of self-government was an "integral part of their distinctive culture," and thus was incorporated in the common law doctrine of Aboriginal rights.¹⁰

THE TEST FOR EXTINGUISHMENT

The Supreme Court decision in *Sparrow* held that any common law Aboriginal rights that were not extinguished prior to 1982 are "existing" and thus "recognized and affirmed" in a contemporary fashion by section 35 of the *Constitution Act, 1982*. The Court made clear that extensive and detailed regulation or impairment of a right does not amount to extinguishment.¹¹ Adopting the test put forward by Hall J.A. in *Calder* (1973),¹² the Court held that a right is extinguished only when it is completely abrogated by a "clear and plain" intention of the sovereign.¹³ The Crown has the burden of establishing these elements of extinguishment.

Neither the Aboriginal title nor the Aboriginal right of self-government of the Gitksan and Wet'suwet'en peoples have ever been explicitly extinguished. A question that arises,

therefore, is whether sovereign intent can ever be "clear and plain" if not explicitly stated in legislation. All members of the B.C.C.A. in *Delgamuukw* held that implicit legislative extinguishment is possible. For example, Macfarlane J.A. noted that the Supreme Court had not stated in *Sparrow* that intent to extinguish must be expressly stated in legislation. It followed, in his view, that a clear and plain sovereign intention "may be declared expressly or manifested by unavoidable implication."¹⁴ Extinguishment by necessary implication is possible only in those rare cases where "the interpretation of the statute permits no other result."¹⁵

This conclusion, allowing the possibility of extinguishment by necessary legislative implication, is faithful to the word of the *Sparrow* decision but, arguably, not to its spirit. The strict test for extinguishment is an important limitation on the orthodox and draconian view that prior to 1982 Aboriginal rights existed at "the pleasure of the Crown."¹⁶ The unilateral expropriation of Aboriginal rights was an extraordinary possibility that was apparently available to the colony of British Columbia prior to 1871 and to the government of Canada from 1871 to 1982.

The legal basis for untrammelled British, and later Canadian, sovereign authority over Aboriginal nations has never been adequately explained.¹⁷ Ultimately it rests on the common law doctrine of discovery, or the notion that sovereignty over an uninhabited territory vests in the discovering or settling power. In applying this principle to British North America, judges have managed to skirt the fact that Aboriginal Peoples did indeed inhabit the territory. The *Delgamuukw* decision continues a tradition that has woven this ugly fiction into the fabric of our law. Wallace J.A., for example, relied on decisions that limited the application of the doctrine of discovery to "uninhabited" or "unoccupied" territories,¹⁸ yet he did not find it necessary to explain how the principle could possibly be relevant to territories occupied by the Gitksan and Wet'suwet'en.

If Canadian courts are unwilling to question the validity of the assertion of British or Canadian sovereignty over Aboriginal societies, as it appears they are,¹⁹ then the principle of extinguishment has an especially crucial role to play in limiting the ability of contemporary Canadian governments to argue that the actions of their predecessors amounted to effective unilateral expropriation of Aboriginal interests. One important role that the "clear and plain intention" test could fulfil is the prevention of expropriation without at least some notice to the persons most affected, namely, the holders of the Aboriginal rights. Expropriation without notice is especially offensive, because those persons detrimentally affected are not informed of the change in their legal position and thus are deprived of an opportunity to object to the taking without consent.

The "clear and plain intention" test is closely related to the "honour of the Crown:" if the Crown has not explicitly conveyed its intention to Aboriginal Peoples, how can it be said that its intention is either honourable or "clear and plain"? Clear and plain to whom? Surely it is not just the subjective intention of non-Aboriginal authorities that ought to be relevant. There ought to be a requirement that the intention be made clear and plain in an objective or public sense, particularly to Aboriginal persons whose knowledge and awareness of the significance of European legal practices cannot be presumed. These considerations suggest that a stricter understanding of the requirement of "clear and plain intention" than that adopted by the B.C.C.A. would be more consistent with the twin goals of upholding the honour of the Crown and promoting a just settlement for Aboriginal Peoples that the Supreme Court has said should guide the interpretation of section 35.²⁰

EXTINGUISHMENT OF ABORIGINAL TITLE

The B.C.C.A. held unanimously that thirteen colonial instruments passed between 1858 and 1870 did not manifest a clear and plain sovereign intention to extinguish Aboriginal title by necessary implication. These enactments asserted Crown title over all lands in B.C. and empowered the Governor to sell Crown lands in the colony. They made no mention of Aboriginal interests in land. Macfarlane J.A. stated that the purpose of these enactments was to facilitate settlement, not to disregard Aboriginal interests nor to foreclose the treaty process.²¹ The other judges all agreed that the taking of underlying title by the Crown was not inconsistent with a recognition of the burden constituted by Aboriginal title.²²

All of the judges agreed that after B.C. joined Confederation in 1871, section 91(24) of the *Constitution Act, 1867* placed the extinguishment of Aboriginal title beyond provincial legislative competence.²³ Nor had the federal government passed any legislation extinguishing Aboriginal title between 1871 and 1982.²⁴ After 1982, extinguishment is constitutionally prohibited because it would not meet the justificatory standard set out by the Supreme Court in *Sparrow*.²⁵ The judges noted that the ways in which Aboriginal title and grants of fee simple and other property rights will co-exist "cannot be decided in this case, and are ripe for negotiation."²⁶

It followed, then, that Aboriginal title is an existing Aboriginal right in British Columbia, now afforded constitutional protection by section 35 of the *Constitution Act, 1982*. The question of extinguishment that had divided the

Supreme Court 3-3 in the *Calder* case twenty years earlier has finally been resolved. It seems highly unlikely that the present Supreme Court will disagree with the persuasive reasoning of the B.C.C.A. on this point, especially in light of the B.C. (and federal) government's demonstrated willingness to begin negotiations on settling the land claims covering most of the province.

EXTINGUISHMENT OF ABORIGINAL SELF-GOVERNMENT

A 3-2 majority of the B.C.C.A. found that any Aboriginal right of the plaintiffs' to exercise legislative jurisdiction over their lands and peoples had been extinguished by either the acquisition or exercise of sovereignty over the mainland colony in 1846 and 1858 respectively, or, in the alternative, by the entry of B.C. into Confederation in 1871. In Macfarlane J.A.'s judgment, "any vestige of aboriginal law-making competence was superseded" on "the date that the legislative power of the Sovereign was imposed."²⁷ He agreed with the trial judge that this likely occurred in 1858 when the mainland colony was established and the governor was empowered by imperial legislation to make all laws necessary for the good governance of the colony. If he was mistaken with respect to colonial extinguishment, Macfarlane J.A. was of the opinion that continuing Aboriginal rights of self-government were "inconsistent with the division of powers found in the *Constitution Act, 1867* and introduced into British Columbia in 1871. Sections 91 and 92 of that Act exhaustively distribute legislative power in Canada ... The division of governmental powers between Canada and the Provinces left no room for a third order of government."²⁸

Wallace J.A. fixed the moment of extinguishment of Aboriginal self-government in B.C. at an earlier date, namely the acquisition of sovereignty by the British over the territory in 1846 pursuant to the Oregon Boundary Treaty. At that point, "supreme legal authority vested with the British Crown" and "the Indians became subjects of the Crown and the common law applied throughout the territory and to all inhabitants."²⁹ Like Macfarlane J.A., Wallace J.A. was of the view that, in the event that any rights of self-government survived the colonial period, they were eliminated by the exhaustive distribution of legislative power between Parliament and the provincial legislature that came into force in 1871.³⁰

The reasoning of the majority judgments is open to challenge on a number of fronts. For one, Macfarlane and Wallace JJ. failed to apply the clear and plain intention test for extinguishment to this issue. Indeed, they did not discuss the test for extinguishment until later in their reasons, as if somehow it was not relevant to the question of whether an

Aboriginal right of self-government continues to exist. If they had applied the test they developed, they would have found extinguishment of an Aboriginal right of self-government only if there was no other possible interpretation of the consequences of the assertion of British and Canadian sovereignty.

Secondly, both judges cited Dicey in support of the absolute supremacy of the British Parliament.³¹ Wallace J.A., after quoting Dicey, asserted that the claim of Aboriginal jurisdiction "is incompatible with every principle of the parliamentary sovereignty which vested in the Imperial Parliament in 1846."³² Yet, accepting the authority of Dicey's views regarding the domestic powers of the British parliament, they do not necessarily hold when applied to an unconquered, unsundered territory occupied by indigenous nations. The British principle of parliamentary supremacy is not, and never has been, an absolute in the Canadian context.³³ It has had to yield, for example, to Canadian constitutional realities such as the division of powers in a federal state and the entrenchment of guaranteed rights in constitutional documents. A possible interpretation of the assertion of British sovereignty over B.C. is that the principle of parliamentary supremacy had to yield to accommodate the presence of self-governing indigenous societies, just as it has had to yield to other Canadian realities.³⁴

Similarly, as Rand J. stated in 1958, the principle of exhaustiveness is "subject always to the express or necessarily implied limitations of the [1867] Act itself."³⁵ The question, then, is whether the presence of self-governing Aboriginal nations in Canada is a "necessarily implied limitation" on the powers of provincial and federal governments,³⁶ a question that is avoided by treating the exhaustiveness principle as an absolute. It is worth noting that in past judicial decisions, the principle of exhaustiveness has been put to the service of the federal ideal of co-ordinate and equal sovereign authorities.³⁷ In this sense, it is troubling to see the principle employed to maintain and justify a distinctly non-federal, colonial relationship between Aboriginal and non-Aboriginal governments.

Nevertheless, even if we accept that Aboriginal sovereignty could be extinguished without consent prior to 1982, and that it was in fact so displaced by the assertion or exercise of colonial sovereignty, or by the coming into force of the *Constitution Act, 1867*, it does not follow that the Aboriginal right of self-government has ceased to exist for the purposes of section 35 of the *Constitution Act, 1982*. The Dicey theory of parliamentary supremacy and its federal derivative, the principle of exhaustiveness, simply lead to the conclusion that the combined legislative authority of non-Aboriginal Canadian governments was plenary prior to 1982. Therefore, there was no space, prior to 1982, for Aboriginal self-government that amounted to a co-ordinate sovereignty or

third order of constitutional government. But that is a far cry from saying that Aboriginal governmental traditions and practices ceased to exist and thus are not constitutionally protected after 1982 by section 35.

In other words, the most that can be said, following Dicey, is that the colonial government of B.C. prior to 1871, and the federal government from 1871 to 1982, had the power or capacity to unilaterally extinguish all vestiges of Aboriginal self-government. But the mere existence of this capacity is not proof of its exercise. With respect, the majority judges in *Delgamuukw* confuse the *capacity to extinguish* with *actual extinguishment in fact*. As a result, they left aside the potential of section 35 to create a constitutional guarantee of jurisdiction where none existed before.³⁸

Following the *Sparrow* decision, even detailed regulation of the self-governing practices and traditions of the Gitksan and Wet'suwet'en peoples would not amount to extinguishment of their Aboriginal right of self-government. Yet as Hutcheon J.A. noted in dissent, the self-governing practices of the plaintiffs could not have been extinguished prior to 1871, because the penetration of European society in the territory had barely commenced.³⁹ After 1871, B.C. lacked the jurisdiction to pass laws having the intent or effect of extinguishing Aboriginal rights. In the dissenters' view, federal legislation passed after 1871, including successive *Indian Acts*, heavily regulated the right of self-government, but did not amount to a clear and plain blanket extinguishment.⁴⁰

There are persuasive reasons for preferring the dissenting position in *Delgamuukw* that the plaintiffs' Aboriginal rights of self-government were not extinguished prior to 1982, and thus are existing rights recognized and affirmed by section 35. On this view, even if Aboriginal self-government rights fell short of constitutionally-guaranteed autonomy or jurisdiction prior to 1982, this is no longer the case. The exercise of the right of self-government is protected from any government interference that cannot meet the strict justificatory standard set out by the Supreme Court in *Sparrow*.

CONCLUSION

Together with the change in provincial government policy signalled by the establishment of the B.C. Treaty Commission, the Court of Appeal judgment in *Delgamuukw* brings an end to the era of official denial of the existence of Aboriginal title in B.C.. Nevertheless, in other respects, the majority decisions are open to many of the same objections that critics have levelled at the McEachern judgment. I have focussed here on the failure of the majority to apply the same rigour to the question of extinguishment of Aboriginal self-government

as they did to their analysis of the extinguishment of Aboriginal title.

Given the position taken by the majority judges, their statements wishing the parties success in resolving their differences through negotiation ring rather hollow in so far as self-government is concerned. To understate the obvious, blanket extinguishment places Aboriginal Peoples in an unenviable bargaining position. In their defence, the judges insisted that the role of the court was to state the law rather than to facilitate a just settlement through negotiations.⁴¹ Yet this insistence on marking clear boundaries between law and politics is futile and compromises the ability of section 35 jurisprudence to achieve its remedial promise of a just settlement for Aboriginal Peoples. A glance at the history of relations between Aboriginal Peoples and the Canadian state reveals that the content of legal doctrine and the outcome of negotiations have moved together in a close dialectical relationship. Legal decisions have played and will continue to play a crucial role in setting the parameters of negotiations and shaping the realm of the possible for Aboriginal Peoples. □

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Endnotes

1. (1993), 104 D.L.R. (4th) 470 (B.C.C.A.), leave to appeal to the Supreme Court of Canada granted, March 10, 1994.
2. *R. v. Sparrow*, [1990] 1 S.C.R. 1075.
3. The trial judgment in *Delgamuukw* attracted much negative academic comment. See, for example, Frank Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (Lantzville: Oolichan Books, 1992) and the symposium of anthropological views in (1992) 95 B.C. Studies.
4. *Supra* note 2 at 1099.
5. *Supra* note 1 per Macfarlane J.A. at 492; Wallace J.A. at 571-2; Lambert J.A. at 646.
6. For example, *Calder v. A.-G. B.C.*, [1973] S.C.R. 313; *Mabo v. Queensland*, (1992) 107 A.L.J. 1.
7. *Supra* note 1 at 730, 739.
8. *Ibid.* at 761, 764.
9. *Ibid.* at 543.
10. For further discussion of this point, see Slattery, "First Nations and the Constitution: A Question of Trust" (1992) 71 Can. Bar Rev. 261, 278-9; Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution* (Ottawa: Supply and Services, 1993) 19-21.
11. *Supra* note 2 at 1097-9.
12. *Supra* note 6.
13. *Supra* note 2 at 1099.
14. *Supra* note 1 at 523.
15. *Ibid.* at 525. The same test was adopted by the other members of the Court: see Wallace J.A. at 595, Lambert J.A. at 667-8, and Hutcheon J.A. at 753.
16. Lambert J.A. pointedly rejected this language as a reflection of "the highest style of imperial glory" and "a discredited imperial and colonial approach to indigenous peoples." *Supra* note 1 at 662-3.
17. For further discussion of this point, see McNeil, "Envisaging Constitutional Space for Aboriginal Governments" (1993) 19 Queen's L.J. 95; Foster, "Forgotten Arguments: Aboriginal Title and Sovereignty in *Canada Jurisdiction Act Cases*" (1992) 21 Man. L. J. 343; Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill L.J. 382; Asch and Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*" (1991) 29 Alta. L. Rev. 498; Slattery, "Aboriginal Sovereignty and Imperial Claims" (1991) 29 Osgoode Hall L.J. 681.
18. *Supra* note 1 at 566-7.
19. See *Sparrow*, *supra* note 2 at 1103: "... there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to lands vested in the Crown...".
20. *Ibid.* at 1105-8. Macfarlane J.A. did acknowledge that the honour of the Crown is a relevant consideration in determining the approach to the question of extinguishment. *Supra* note 1 at 524.
21. *Supra* note 1 at 530-1.
22. *Ibid.*, per Wallace J.A. at 595; Lambert J.A. at 675; Hutcheon J.A. at 753.
23. *Ibid.*, per Macfarlane J.A. at 535; Lambert J.A. at 681.
24. *Ibid.*, per Macfarlane J.A. at 538-9; Lambert J.A. at 681-5.
25. *Ibid.*, per Lambert J.A. at 686.
26. *Ibid.*, per Macfarlane J.A. at 539.
27. *Ibid.* at 519.
28. *Ibid.* at 519-20.
29. *Ibid.* at 591.
30. *Ibid.* at 592-3.
31. *Ibid.*, per Macfarlane J.A. at 520 and Wallace J.A. at 592.
32. *Ibid.* at 592.

33. See Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1991) 36 McGill L.J. 308 at 310, fn. 4.
34. See Macklem, "Distributing Sovereignty: Indian Nations and Equality of Peoples" (1993) 45 Stanford L. Rev. 1311.
35. *Murphy v. C.P.R.*, [1958] S.C.R. 626, 643.
36. For an argument that it is, see Ryder, *supra* note 33 at 314-5.
37. *Bank of Toronto v. Lambe* (1887), 12 A.C. 575, 587; *Union Colliery v. Bryden*, [1899] A.C. 580, 585; *A.-G. Ontario v. A.-G. Canada (Reference Appeal)*, [1912] A.C. 571, 581, 584; *A.G. Can. v. A.G. Ont. (Labour Conventions)*, [1937] A.C. 326, 354; *Murphy*, *supra* note 35; *Jones v. A.G. N.B.*, [1975] 2 S.C.R. 182, 195; *Re Agricultural Products Marketing*, [1928] 2 S.C.R. 1198, 1296; *Re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 754, 820-1.
38. See Foster, *supra* note 17 at 350, fn. 20; McNeil, *supra* note 17 at 119.
39. *Supra* note 1 at 761.
40. *Ibid.*, per Hutcheon J.A. at 763; Lambert J.A. at 729-30. Accord: Slattery, *supra* note 10 at 278-87; Royal Commission on Aboriginal Peoples, *supra* note 10 at 35: the *Indian Act* did not "deprive Indian peoples of all governmental authority, even if it severely disrupted and distorted their political structures and left them with very limited powers."
41. *Supra* note 1, per Macfarlane J.A. at 520, 547; Wallace J.A. at 601; Lambert J.A. at 603.



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Endnotes

1. [1993] 3 S.C.R. 519; internally cited page references in this paper refer to this report.
2. For further discussion of the cultural and legal significance of embodiment see: R. Mykitiuk, "Fragmenting the Body" (1993) 1(2) *Australian Feminist Law Journal*.
3. Leslie Bender, "A Feminist Analysis of Physician-Assisted Dying and Voluntary Active Euthanasia" (1993) 59 *Tenn. L. Rev.* 519.
4. Bender, *ibid.* at 534.
5. Trip Gabriel, "A Fight to the Death: Was Ann Humphry's 'Final Exit' Intended to Pull the Plug on Her Ex-husband's Right-to-die Movement?" *New York Times* (8 December 1991) ss.6 (Magazine), 46 cited in Peter A. Ubel, M.D. "Assisted Suicide and the Case of Dr. Quill and Diane" *Issues in Law and Medicine*, 8:4 (Spring 1993) 487 at 491.
6. Timothy E. Quill "Death and Dignity — A Case of Individualized Decision Making" (1991) 324 *New Eng. J. Med* 691.
7. Lawrence K. Altman, "Jury Declines to Indict Doctor Who Said He Aided in a Suicide" *New York Times* (27 July 1991) at 1.
8. Ubel, *supra* note 5 at 497.
9. *Ibid.* at 498.

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